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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1943.

TAYLOR INSTRUMENT COMPANIES
*Petitioner,*

vs.

FAWLEY-BROST COMPANY,
*Respondent.*

No. 689

**PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY TAYLOR INSTRUMENT COMPANIES.**

## BRIEF FOR THE BROWN INSTRUMENT COMPANY AS AMICUS CURIAE.

THE BROWN INSTRUMENT COMPANY,
By BAIR & FREEMAN,
*Its Attorneys.*

WILL FREEMAN,
C. B. SPANGENBERG,
*Of Counsel.*

MCCORMICK AND HENDERSON, INC., CHICAGO

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## BRIEF FOR THE BROWN INSTRUMENT COMPANY AS AMICUS CURIAE.

This brief for The Brown Instrument Company as *amicus curiae* is limited to a single question involving interpretation of the Copyright Law.

## OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is published in

*56 United States Patent Quarterly* 213

and the judgment of said Court appears at R. 409. The District Court found certain "charts" to be the subject matter of copyright and decreed defendant (respondent here) to be an infringer.

The opinion of the Circuit Court of Appeals is not yet officially reported. It appears at R. 428. It is published in

*59 United States Patent Quarterly* 384.

The Circuit Court of Appeals found the "charts" not to be the subject of copyright protection and reversed the District Court.

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925, U. S. C. A., Title 28, Section 347 (a).

## STATUTES INVOLVED.

Copyright Act of 1909, Title 17, Sections 4 and 5, Par. (i).

"Section 4. All writings of author included

The works for which copyright may be secured under this title shall include all the writings of an author.

Section 5. Classification of works for registration.

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * * * * *

(i) Drawings or plastic works of a scientific or technical character.

* * * * * *

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title."

## THE QUESTION PRESENTED.

Are "charts" for use with recording instruments or "mechanical devices", the subject of copyright protection?

(a) Do such "charts" constitute "writings" within the meaning of Section 4 of the Copyright Act?

(b) Do such "charts" constitute "drawings" within the meaning of Section 5, Par. (i) of the Copyright Act?

## INTEREST OF THE BROWN INSTRUMENT COMPANY.

The Brown Instrument Company is a corporation of Pennsylvania and has its principal place of business in the City of Philadelphia. The Brown Instrument Company for more than twenty-five years has been engaged in the manufacture and sale of automatic recording instruments and charts to be used with recording instruments.

This case with respect to the copyright question raises an issue which reaches far beyond the interests of the adverse parties in the above-entitled cause.

The copyright issue involves consideration as to the protection afforded Authors, whose works are to be used with other mechanical devices. This case involves charts, which are used with recording instruments.

The Brown Instrument Company is one of such "Authors" whose "writings" have heretofore been copyrighted under the Copyright Act, Section 5, Par. (i).

A typical example of the type or kind of charts herein involved is shown by Petitioner's Exhibit B (physical exhibit), R. 66, of the instant case.

The Brown Instrument Company is vitally interested in having this Court determine whether charts are "writings" in accordance with Section 4 of the Copyright Act, and thus come under the further detail classification of "drawings * * * of a scientific or technical character" within Section 5, Par. (i).

The public at large as well as Authors are concerned in the scope of subject matter which may be lawfully copyrighted.

Heretofore and for many years, The Brown Instrument Company has copyrighted such "charts" by duly filing its applications with the Register of Copyrights, of The Library of Congress, and such applications were duly registered by the Register of Copyrights. Since the decision by the Seventh Circuit Court of Appeals, the Register of Copyrights has apparently been left in a state of uncertainty as to what should be done in connection with such applications for copyright protection on charts. A letter of the Register of Copyrights of the Library of Congress is here quoted:

"Office of the
Register of Copyrights
1-7-44

THE LIBRARY OF CONGRESS
Copyright Office
Washington
25, D. C.

Brown Instrument Company
Wayne and Roberts Avenues
Philadelphia 44
Pennsylvania

*Attention of C. B. Spangenberg, Esquire*

Gentlemen:

Referring to the applications recently received for registration in behalf of The Brown Instrument Company of 'Chart No. 1625T' and 'Chart No. 5414-X,' two copies of each of which were duly received under separate cover:

Before taking further action, it seems desirable to call to your attention for consideration the recent case of Taylor Instrument Companies v. Fawley-Brost Company, reported in the December 11, 1943, number of the United States Patent Quarterly (Vol. 59, pages 384-389), wherein the Circuit Court of Appeals for the 7th Circuit held that a chart for recording temperature is not copyrightable since it is 'a mechanical element of the instrument of which it is an integral part'; that such a chart is as indispensable to the operation of a recording thermometer as are any of the other elements. In other words, that these charts are objects of use rather than objects of explanation, and hence not subject to copyright protection.

If this is good law, then it would seem that the Copyright Office would not be entitled to register charts of this character, and we shall await with interest any comments you may wish to submit. Meantime the material will be held in abeyance under your 'Deposit Account.'

Respectfully
Richard C. DeWolf
Acting Register of Copyrights
By H."

The question here presented has never been passed upon by this Court. Hence the interest of The Brown Instrument Company as an applicant for copyright protection and as an Author.

## ARGUMENT.

The charts involved are to be used with recording instruments for making a record. The preparation of these charts by the Author requires a high degree of technical skill and embodies intellectual effort, care and discrimination in a field involving complex mathematical calculations. The charts disclose the results of such intellectual effort, and they, themselves, convey information. A person, versed in scientific or technical matters, can read these charts as he would any other drawing or book. They convey to him information, the type, operating characteristics and range of operation of a recording machine, and the type of additional information he may expect to find upon additional uses of the charts. They, themselves, convey just as much information as a word picture.

These charts are "writings" within the meaning of the Copyright Act. They convey information upon inspection and when ultimately used convey additional information.

Section 5, Par. (i) of the Copyright Act specifically provides a classification in which the charts fall,—that is, charts are drawings of a scientific or technical character.

It thus follows that writings referred to in Section 4 of the Act are all inclusive of many different kinds of intellectual and scientific work on the part of Authors. Drawings of a scientific nature thus come within the general term "writings."

Congress specifically provided that an Author whose writing was in the form of a drawing should be fully protected in such work against unauthorized copying or pirating for a limited period of time, and therefore provided a sub-classification of Section 5, Par. (i), to protect such Authors in their "writings" in the form of drawings.

The chart itself conveys information and because it can be used with a recording instrument does not of itself lessen

or detract from the "work of the Author." When the chart has been prepared, it exemplifies the independent effort of an Author and comes within the domain of the Copyright Act, and as such is entitled to protection.

The use made of the chart should not be the determining factor in whether the "drawing" is a "writing" within the meaning of the Copyright Act. It is clear that charts do constitute "writings" within the meaning of Section 4 of the Copyright Act, and that meaning is clearly supported by the classification of Section 5, Par. (i). Congress could not have meant otherwise in view of the wording of Sections 4 and 5.

## CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted because

(a) The copyright question here presented has never been passed upon by this Court;

(b) Authors such as The Brown Instrument Company should know what its rights are with respect to its writings in the form of drawings (or charts) of a scientific or technical character;

(c) The public who purchases such charts should know what its position may be with respect to copyrighted charts which have heretofore been copyrighted in large quantities by the Petitioner in this case, and by other Authors, such as The Brown Instrument Company; and

(d) The Register of Copyrights of The Library of Congress is now in a state of uncertainty with respect

to the decision of the Seventh Circuit Court of Appeals as to whether or not the decision "is good law."

Respectfully,

THE BROWN INSTRUMENT COMPANY,

By BAIR & FREEMAN,
*Its Attorneys.*

.....

WILL FREEMAN,
C. B. SPANGENBERG,
*Of Counsel.*

Chicago, Illinois,
February 7, 1944.